

CURRENT DEVELOPMENTS

PRIVATE INTERNATIONAL LAW

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I. JURISDICTION

Based on service

THE well established rule that an overseas company that establishes a place of business in Great Britain and does not provide an address for service can be served with process at that place of business¹ was thrown into confusion by the insertion into the 1985 Companies Act of several new provisions including a new section 694A(2) which provides that process may only be served on a branch "in respect of the carrying on of the business of the branch".² The new rules did not purport to change the situation in relation to a place of business falling short of a branch, and thus created the anomaly that it was apparently easier to serve a place of business than a branch. The proper interpretation of these rules arose in *Saab v. Saudi American Bank* (Court of Appeal, 2 July 1999).³ Before the case was heard by the Court of Appeal, the new Civil Procedure Rules entered into force on 26 April 1999. Under Part 6.2(2):

A company may be served by any method permitted under this Part as an alternative to the methods of service set out in—

- (a) section 725 of the Companies Act 1985 (service by leaving a document at or posting it to an authorised place);
- (b) section 695 of that Act (service on overseas companies); and
- (c) section 694A of that Act (service of documents on companies incorporated outside the UK and Gibraltar and having a branch in Great Britain).

* This section aims to survey recent developments in selected areas of private international law.

- 1. Companies Act 1985, s.695.
- 2. The new provisions were inserted by the Oversea Companies Credit and Financial Institutions (Branch Disclosure) Regulations 1992, S.I. 1992/3179, which were intended to implement a European Directive relating to financial services.
- 3. 2 July 1999, Court of Appeal.

Under Part 6.5(6) where a party has not given an address for service, a document may be served on a company not registered in England and Wales at “any place of business of the company within the jurisdiction.”

The Court of Appeal took the view that the new rules must be intended to address the problem that had inadvertently arisen out of the amendments to the Companies Act 1985 and thus re-establish the possibility of effecting service at a place of business even when the matter in dispute did not concern the business transacted at that place.⁴

In intellectual property disputes under the 1968 Brussels Convention

The prominence of intellectual property disputes in the context of the Brussels Convention has led to a reconsideration of the principles of jurisdiction and justiciability which were previously thought to apply in relation to intellectual property rights. Following a series of conflicting first instance decisions, the Court of Appeal has now addressed the issue. In *Pearce v. Ove Arup Partnership*⁵ the claimant sought remedies based on copyright infringement. Two of the defendants were domiciled in England. Two were domiciled in the Netherlands, and were sued solely in respect of alleged infringements of the claimant’s Dutch copyright in architectural plans. The claimant sought to base the jurisdiction of the English court on Article 6(1) of the 1968 Brussels Convention.⁶ The question therefore arose as to whether the English courts could hear a case concerning the infringement abroad of a foreign intellectual property right.

The defendants argued, *inter alia*, that although the English courts had jurisdiction under the Brussels Convention, the case was not justiciable in the English courts. Lack of justiciability was asserted on two different grounds. First, it was said that a claim for breach of a foreign statutory intellectual property right was local, not transitory, and therefore must be heard in the foreign jurisdiction whose legislation protected the right. The Court of Appeal was not persuaded that it was correct.

Where proceedings are concerned with the registration or validity of patents, trade marks, designs or other similar, rights required to be deposited or registered the local court has exclusive jurisdiction. But where the action is not concerned with registration or validity, the Convention gives jurisdiction to the courts of the defendant’s domicile or to the courts of other Contracting States in accordance with Articles 5 and 6. The question “can the English court inquire into the validity of a patent granted by a Contracting State” is answered by Article 16(4). The question, “does the English court have jurisdiction to entertain proceedings in respect of the alleged infringement of an intellectual property right conferred by the law of a Contracting State where the proceedings fall outside Article 16(4),” is answered by Articles 2, 5 or 6.

4. One of the main issues in *Saab* itself was the interpretation of s.694A of the Companies Act 1985. The Court concluded that a process can fairly be held to be in respect of the carrying on of the business of the branch so long as it is partly in respect of the carrying on of the business of the branch. There is no need for the dispute to “arise out of” the operations of the branch.

5. [1999] 1 All E.R. 769.

6. Allowing co-defendants to be sued in the domicile of one of the defendants.

The view that in a case where the proceedings fall outside Article 16(4) the English court must nevertheless decline jurisdiction because the question is non-justiciable “does not have any place in a rational scheme of jurisprudence.”

The second argument for non-justiciability was that a claim for infringement abroad of a foreign intellectual property right could not satisfy the double-actionability rule applied in tort cases under English private international law rules.⁷ The Court concluded that the exception to the requirement of double-actionability should be applied, allowing the question of infringement to be governed by the law of the Netherlands, as the country with the most significant relationship with the occurrence and with the parties.

Although this reconsideration of the approach of English law to the justiciability of claims for the infringement abroad of a foreign patent has been prompted by the need to apply the Brussels Convention, the judgment of the Court of Appeal does not appear to be influenced by considerations specific to the Convention, and therefore seems capable of wider application.

Over claims in contract and tort under the Brussels Convention

In Case C-51/97 *Réunion Européenne SA v. Spliethoff's Bevractingskantoor BV*⁸ the European Court was asked to interpret Articles 5(1) and (3) and 6(1) of the Brussels Convention in the context of claims brought under a bill of lading.⁹ The bill was issued by an Australian company. Carriage was by sea from Sydney to Rotterdam, and then by road to the consignee's premises in France. On arrival, the consignment of fruit was found to be damaged. The claimants sued at the court for the place of delivery in France. The claim was against the Australian company that issued the bill of lading, but also against the Dutch company which in fact undertook the carriage by sea, and the Dutch Master of the vessel in which the goods were carried. The latter two contested the jurisdiction of the French courts.

The European Court found that jurisdiction over the claims against the Dutch defendants must be based on Article 5(3)—that is, the claims must be characterised as sounding in tort rather than contract. This does not, however, represent a general approach adopted by the Court in relation to claims by a consignee under a bill of lading, but rather reflects the lack of evidence presented to the court as to the relationship between the parties. Since there was no evidence of a contract binding the parties, Article 5(1) could not be relied on.

If jurisdiction was to be based on Article 5(3), it became necessary to identify where the “harmful event occurred”. This could be the place where the damage was suffered, or the place of the event giving rise to the damage. In international transport operations it might be quite impossible to identify the place where the event giving rise to the damage occurred. Reliance would have to be placed on the place where the damage was suffered. The European Court rejected the idea, however, that in the context of multi-modal transport operations that place could be identified as either the place of final delivery, or the place where the damage was discovered. The use of these connecting factors would lead to the creation of a

7. The cause of action arose before the entry into force of the Private International Law (Miscellaneous Provisions) Act 1995.

8. [1999] I.L.Pr. 205.

9. By insurers subrogated to the claims of the consignee.

forum actoris, and would not provide adequate certainty and predictability. Rather, the Court concluded that in an action against a maritime carrier, the place where the damage occurred must be interpreted as the place where the maritime carrier was to deliver the goods.

The final question the Court had to address was whether the jurisdiction of the French court might be based on Article 6(1). It was argued that the actions against the different parties, including the Australian issuer of the bill of lading, were so closely linked that they were “indivisible” and that therefore they should be heard together. An action in France could be maintained against the Australian defendant. The Dutch defendants should be added to this action.

An attempt to rely on Article 6(1) in this context was really a non-starter since it confers jurisdiction on the *domicile* of one of a number of co-defendants to hear (related) claims against all of them. None of the defendants in *Réunion Européenne* was domiciled in France. Nevertheless, the development of this line of argument indicates the importance of “*connexité*” in French legal thinking. The fact that a new claim is related to a claim already pending before the court selected by the claimant is an independent basis of jurisdiction under French law.

When the case resumed in France in March 1999, the French *Cour de Cassation* applied the reasoning of the European Court.¹⁰ Nevertheless, the French courts continue to attach considerable significance to the appropriateness of hearing related actions together. In the same month a differently constituted *Cour de Cassation* concluded that a jurisdiction agreement falling within Article 17 of the 1968 Brussels Convention was not a barrier to the assertion of jurisdiction by a court other than the chosen court on the basis of Article 6(1)—particularly in a case where the two courts belonged to the same legal system and where the litigation appeared to be indivisible in relation to the co-defendants.¹¹

Based on a jurisdiction agreement

The decision of the European Court in Case C-159/97 *Trasporti Castelletti Spedizioni Internazionali SpA v. Hugo Trumpy SpA*¹² contains little that is new in terms of the interpretation of Article 17 of the Brussels Convention, but may be seen as a useful restatement of the approach adopted by the Court.

II. ANTISUIT INJUNCTIONS

The judgment of the Court of Appeal in *Turner v. Grovit*¹³ is of particular interest to all those struggling to identify the precise relationship between Community law and English law in the field of jurisdiction, and the extent to which the English court retains a discretionary control over its procedure. The Court was asked to grant an anti-suit injunction to restrain proceedings in Spain. The claimant was employed as a Group solicitor for the Chequepoint Group of companies. He was employed by English companies within the Group, but was relocated to Spain to work at the premises of a Spanish member of the group (CSA). The ultimate

10. Decision of 17 Mar. 1999.

11. *La Société Amnerlaan v. Les Serres de Cosquerou*, 2 Mar. 1999. [1999] 1.L.Pr. 492.

13. [1999] 3 All E.R. 616.